Supreme Court, U.S.
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No. 07-

IN THE

United States Supreme Court

OCTOBER TERM 2008

CHENG CHUI PING, also Known as SISTER PING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Has plain error been committed, pursuant to F.R.Cr.P. 52(b), where the trial evidence and plainly erroneous jury instructions permit the jury to convict for conduct not proscribed by the charged statute?

PARTIES TO THE PROCEEDING

Petitioner is Cheng Chiu Ping, a/k/a Sister Ping, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cheung Chui Ping, a/k/a Sister Ping, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the Court of Appeals is unreported and is reprinted in the Appendix to the Petition ("Pet. App."), at 1a - 7a. The summary order of the Court of Appeals denying Petitioner's motion for a panel rehearing is unreported and is reprinted at Pet. App. 3a.

JURISDICTION

The order of the Court of Appeals denying Petitioner's petition for a panel rehearing was entered on February 11, 2008. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Grand Jury clause of the Fifth Amendment to the United States Constitution provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The relevant statutory provisions pertaining to the erroneous instructions on money laundering, 18 U.S.C. § 1956(a)(2)(A), 18 U.S.C. § 1956 (c)(7)(A), 18 U.S.C. § 1961(1)(F), and 8 U.S.C. § 1324(a)(1)(A), are reprinted in the appendix at Pet. App. 10a. Also reprinted at Pet. App., is a chart which was included in Petitioner's brief to the Second Circuit outlining the instructional error on the money laundering charge.

STATEMENT OF THE CASE

This case involves an individual described by the government, in its brief to the Second Circuit Court of Appeals, as "one of the most powerful and successful alien smugglers of all time," a woman who "operated her multi-million dollar business out of a small storefront in New York's Chinatown, [with]

'employees' in China, Thailand, Hong Kong, Guatemala, Mexico, and Kenya, among other places."

After a sealed indictment was returned against her in 2000, Petitioner remained at large until 2003, when she was apprehended and extradited to the United States on a five count indictment charging her with conspiracy to engage in alien smuggling, hostage taking, money laundering and trafficking in ransom proceeds in violation of 18 U.S.C. § 371 (Count 1), as well as substantive counts of hostage taking in violation of 18 U.S.C. § 1203 (Count 2), money laundering in violation of 18 U.S.C. § 1956(a)(2)(A) (Counts 3 and 4), and trafficking in ransom proceeds in violation of 18 U.S.C. § 1202. After a four week trial, Petitioner was convicted only on the conspiracy and trafficking counts, as well as one money laundering count, and sentenced to the maximum sentences of five, ten and twenty years respectively, all to be served consecutively to each other.

Our system of justice truly is tested when it is asked to apply the rule of law to persons, like Petitioner, whom it believes should be least entitled to its benefits. In this case, the Second Circuit gave short shrift to the substantial claims of error alleged on direct appeal, and affirmed Petitioner's conviction and twenty year sentence on the money laundering count in a summary order, which it declined to reconsider. *See* A. 7a.

This case presents for review an important and recurring constitutional question left open by *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544 (1997) regarding the application of the plain error rule, F.R.Cr.P. 52(b), to situations like those presented in *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270 (1960) and *United States v. Stromberg*, 283 U.S. 359, 51 S.Ct. 532 (1931), where, the evidence adduced at trial, coupled with plainly erroneous instructions, broadens the offense charged in the indictment to include an improper alternative theory, making it impossible for a reviewing court to determine whether the jury actually rested its guilty verdict on the theory set forth in the indictment.

In Petitioner's trial on the money laundering count, the issue of Petitioner's specific intent to promote the specified unlawful activity identified in the indictment was *the* issue presented to the jury. The District Court interpreted the very specific factual allegations in the money laundering count to encompass the intent to promote two different specified unlawful activities set forth in the money laundering statute. Thus, the District Court instructed the jury in the disjunctive regarding the specific intent required to convict Petitioner on the money laundering charge. One of the theories of guilt, the intent to promote hostage taking, was permissible, the alternative theory, the intent to promote alien smuggling, was not. The jury's notes during its deliberations leave no doubt that it may well have convicted improperly on the impermissi-

ble ground that Petitioner's intent was to promote conduct not proscribed by the money laundering statute, as alien smuggling, as that term was defined by the District Court, is not a specified unlawful activity. The faulty jury instruction made Petitioner's trial and conviction on the money laundering count fundamentally unfair and unreliable. *See Chiarella v. United States*, 445 U.S. 222, 237 n.21, 100 S.Ct. 1108 (1980). Acknowledging that the instructional error was made, the Second Circuit, in a summary order, nevertheless found it to be not only not plain, but harmless as well. The question presented is whether this Court will allow this type of conviction to stand.

A. The relevant count of the indictment charged Petitioner with international money laundering with the intent to promote a specified unlawful activity in violation of 18 U.S.C. § 1956(a)(2)(A). After tracking the language of the statute, the indictment alleged, very narrowly and specifically, that:

> "In or about March 1991, . . . , [Petitioner], . . . unlawfully, willfully and knowingly did transport, transmit and transfer, and attempt to transport, transmit and transfer, a monetary instrument and funds, to wit, approximately $30,000, from a place in the United States, namely, 47 East Broadway, New York, New York, to and through a place outside the United States, namely, Bangkok, Thailand, with the intent to promote the carrying on of specified unlawful activity, to wit,

> the smuggling by airplane of four aliens from the PRC to New York where they would be held hostage until money was paid."

The federal money laundering statute at issue in this case, 18 U.S.C. § 1956(a)(2)(A), makes it a crime to transport, transmit, transfer or attempt to transport, transmit or transfer funds from a place in the United States to a place outside the United States, with the intent to promote the carrying on of a specified unlawful activity. There are thus two essential elements of the offense: (1) transporting or transmittal of funds from the United States to a place outside the United States; and (2) intent to promote the carrying on of a specified unlawful activity.

The term "specified unlawful activity" is expressly defined in the money laundering statute as any one of a host of unlawful activities defined by other statutes. *See* 18 U.S.C. § 1956(c)(7). Although the money laundering count at issue did not identify, by statute, the intended specified unlawful activities found by the Grand Jury, its language clearly encompassed two interrelated, but distinct, specified unlawful activities: the intent to promote "hostage taking" in violation of 18 U.S.C. § 1203 (*see* 18 U.S.C. § 1956(c)(7)(D)), and the intent to promote alien smuggling "*committed for the purpose of financial gain.*" (*See* 18 U.S.C. § 1956 (c)(7)(A), and § 1961(1)(F) (emphasis added)).

The Grand Jury could not, as a matter of law, have found the specified unlawful activity to merely

be "alien smuggling," without the purpose of financial gain, because this conduct, while clearly a criminal activity under the immigration laws (*See* 8 U.S.C. § 1324(a)(1)(a)), is not a *specified* unlawful activity under the money laundering statute. To permit the petit jury to use this Title 8 definition of alien smuggling to convict was clearly a fundamental error affecting the reliability of the jury's verdict, if the evidence permitted a conviction on this improper theory. As shown below, that is precisely what occurred.

B. The proof at trial on the challenged money laundering count came primarily from the testimony of one cooperating witness, Weng Yu Hui ("Weng"). Weng testified that he was raised in the same village in China as Petitioner. In 1984, he sought out Petitioner after learning that she had unlawfully, but successfully, smuggled other villagers into the United States. Leaving his father, mother, wife and children in China, Weng agreed to pay Petitioner an $18,000 smuggling fee to bring him into the United States. After making a partial payment, Weng was smuggled by Petitioner into the United States, through Hong Kong, Guatemala and Mexico. Upon his arrival in the United States, Weng remained with Petitioner until the payment of the balance of his smuggling fee was guaranteed.

After Weng arrived in the United States, he became friendly with Petitioner. She recommended Weng for a job in her uncle's restaurant. Knowing from his own personal experience that Petitioner was a successful alien smuggler, Weng soon

learned that Petitioner also operated an underground money transmitting business from her store/restaurant located on East Broadway in the Chinatown section of New York City. Weng would go to Petitioner's store/restaurant to eat and socialize with other Fujianese people, including Petitioner, and to send money back to his relatives in China through Petitioner's money transmitting business.

In March, 1991, Weng decided to give the alien smuggling business a try. His first attempt as an alien smuggler involved working with co-conspirators in Thailand to smuggle four Chinese nationals from Thailand into the United States. At the time, the "going rate" for smuggling one person into the United States was approximately $25,000.

To finance his smuggling operation, Weng borrowed $30,000 in cash, brought it to Petitioner's store and provided Petitioner with information permitting her to transmit the money to Thailand, in exchange for the 3% fee Petitioner typically charged. At the time Petitioner arranged for the money transfer, she joked with Weng that he was "now [her] competitor," but Weng did not disclose his purpose for the money transfer, as the Government conceded in its appellate brief to the Second Circuit. It was only after Weng successfully smuggled the aliens into the United States, subsequent to the money transfer, that Weng brought the aliens to Petitioner's store and informed her for the first time that he, too, was an alien smuggler.

In March, 1991, at the time of the money transfer, Petitioner had relatives in Thailand whom she was unable to smuggle into the United States, but she made no mention of this to Weng. However, in the summer of 1991, after learning that Weng had successfully smuggled aliens into the United States from Thailand, Petitioner hired him, for a fee of $72,000, to smuggle three of her own relatives into the United States.

Apart from the unresponded to joking remark, no other evidence was presented at trial establishing that Petitioner knew of Weng's purpose when she effected the money transfer in March, 1991, or that her specific intent when effecting the transfer was to do anything other then earn the 3% commission for the service provided. The government maintained that Petitioner's joking remark proved Petitioner's actual knowledge of Weng's purpose in effecting the money transfer, and that the jury could therefore infer her specific intent to promote or facilitate his first alien smuggling venture.

Petitioner's defense to the money laundering charge was that she merely operated a money transmitting service, and did not involve herself in the affairs of the individuals on whose behalf she transmitted money. Thus, she could not have knowingly and intentionally promoted Weng's very first alien smuggling venture, because she was not aware of his purpose when effecting the $30,000 money transfer, and her joking remark could not and did not prove her knowledge of Weng's purpose

or her intent to promote it because Weng did not respond to her joking remark.

C. In its instructions to the jury explaining the various *mens rea* elements of the charged offenses, the District Court defined the term "knowingly," and charged on the conscious avoidance of knowledge as an alternative to actual knowledge. Petitioner's counsel did not request, and the District Court did not instruct, that in order to find the specific intent to promote or facilitate the carrying on of the charged specified unlawful activities, it could not simply rely upon the conscious avoidance doctrine. *See*, e.g., *United States v. Mankani*, 738 F.2d 538, 547 n.1 (2d Cir. 1984) (conscious avoidance doctrine applicable where guilty knowledge is essential element of offense; it cannot be used to prove specific intent). Thus, the jury was permitted to use the conscious avoidance of knowledge doctrine to convict Petitioner of intentionally promoting a specific alien smuggling venture of which she had no knowledge.

In its instructions on the challenged money laundering count, the District Court charged that the government had to prove two elements: first, that the Petitioner or others she aided and abetted transported a monetary instrument from the United States to a place outside the United States; and, second, that she "acted with the intent to promote the carrying on of specified unlawful activity, namely the acts of alien smuggling or hostage taking specified" in the indictment. The District Court further instructed that to satisfy the second ele-

ment of the money laundering statute, the jury would have to agree unanimously "as to which unlawful activity—alien smuggling or hostage taking, or both—[Petitioner] intended to promote, facilitate or assist." The instruction on intent was thus in the disjunctive alerting the jury that the intent to promote the carrying on of alien smuggling was a basis for conviction, separate and apart from the intent to promote the detention of the aliens until the smuggling fee was paid.

At no point in its instructions on the elements of the money laundering count did the District Court provide guidance, as it should have, as to the statutory definitions of hostage taking or alien smuggling, as set forth in subsection (c)(7) of the money laundering statute and section 1961(1)(f) of the Rico statute. Thus, the jury never was charged that the specified unlawful activity of alien smuggling *had to be committed for the purpose of financial gain*. Instead, at a later point in its instructions, when discussing the conspiracy charge, the District Court defined the term "alien smuggling" pursuant to 8 U.S.C. § 1324(a)(1)(A), which does not require that the alien smuggling be committed for financial gain. The District Court handed out its instructions to the jury, took pains to "caution you [the jury] also that the indictment does not determine what rules of law you are to use in deciding this case" and further told the jury that "[t]he entire charge is to be considered as an integrated statement and to be taken together." Thus, a reasonable juror could well have understood that the alien

smuggling referred to in the money laundering count as a specified unlawful activity did not have to be committed for financial gain, as opposed to the other specified unlawful activity of hostage taking activity which did.

Viewing the instructions in their totality and as an integrated statement, it is evident that the jury properly was instructed on the term hostage taking, as that term is used in the money laundering statute, but improperly instructed on the term alien smuggling. This was conceded by the government and acknowledged by the Second Circuit. Thus, two distinct theories of guilt were provided to the jury—a valid theory involving the specific intent to promote hostage taking, and an invalid theory involving the specific intent to promote alien smuggling, which did not have to be for financial gain, because the wrong statute was used to define this term.

Since the District Court erred in its instructions, the jury likely believed it could convict if it found that Petitioner believed, at the time of the money transfer, that Weng was transmitting the funds for the purpose of smuggling in his own relative, for personal, not pecuniary, reasons. Thus, during its deliberations, the jury repeatedly asked for readbacks of Weng's testimony, asked questions relating to Weng's smuggling of his own relatives, and, at one point, indicated that it might be deadlocked on the money laundering count. These questions, particularly the questions from the jury regarding the smuggling of relatives, demonstrated that the

trial court failed adequately to instruct the jury. *See*, e.g. *Shafer v. South Carolina*, 532 U.S. 36, 52-53, 121 S.Ct. 1263 (2001) (examining questions from jury during deliberations).

Inexplicably, trial counsel did not object to the District Court's instruction, permitting the jury to consider the impermissible theory based on the wrong definition of alien smuggling. Instead, trial counsel argued only that the District Court was required to submit to the jury the specified unlawful activities in the conjunctive, that is that the jury had to find that Petitioner's specific intent was to promote alien smuggling and hostage taking because the specified unlawful activity of alien smuggling charged in the money laundering count was a particular type of alien smuggling involving hostage taking.

D. On appeal, Petitioner contended that the erroneous instruction on money laundering, coupled with the conscious avoidance of knowledge instruction, broadened the basis for conviction and allowed the jury to convict for a non-existent crime. Petitioner further argued on appeal that this type of instructional error, which implicated the Constitutional right to a jury trial only on the lawful charge returned by a Grand Jury was plain error affecting a substantial right because the evidence adduced at trial permitted her to be convicted of a non-existent crime—money laundering with the intent to promote an unlawful activity that was not a specified unlawful activity.

In its summary order, the Second Circuit rejected Petitioner's claim, holding that "the requisite purpose of financial gain, though not alleged in so many words in the indictment, was consistent with, and implied by, its allegations regarding the fees demanded from the aliens." Pet. App. 4a. Ignoring the notes sent by the jury which revealed that they likely considered the unlawful theory, the Court substituted its own view of the effect of the error and "discern[ed] no risk that [Petitioner] was either convicted of an offense that was not charged in the indictment or that she lacked sufficient notice to prepare for trial. *See United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992)." Pet. App. 4a.

Explaining that "the more natural way to understand this argument is as a challenge to the jury charge," the Court performed a plain error analysis pursuant to Fed.R.Cr.P. 52(b). It found that "[g]iven the overwhelming evidence that [Petitioner] knew such smuggling activities were engaged in for purposes of profit, any error in the charge was not only not plain, it was harmless." Pet. App. 5a. However, the defense in this case was not that alien smugglers did not engage in smuggling activities for purposes of profit. Rather, the issue presented to the jury was whether Petitioner's joking remark at the time of the money transfer proved, beyond a reasonable doubt, that she knew of and intended to promote Weng's efforts to earn money by smuggling four aliens into the United States.

Relying on *United States v. Nektalov*, 461 F.3d 309 (2d Cir. 2006), the Second Circuit held that the government was not required to prove that Petitioner actually knew of Weng's purpose. Instead, the Court held that the conscious avoidance of knowledge theory was proper as to the money laundering charge, stating,

> "assuming *arguendo* that this testimony [Petitioner's joking with Weng] failed to establish [Petitioner] *knew* the transfer would promote alien smuggling, it suggested at least that she 'suspected, but was not completely certain' of it, yet 'deliberately avoided asking any questions . . . that might have confirmed [her] suspicions. *Id.* at 317.' "

Pet. App. 5a - 6a. (Emphasis added by Second Circuit).

However, if the Second Circuit had trouble finding that Petitioner actually knew what Weng was up to at the time of the money transfer, the jury likely had the same difficulty. This is precisely why it would have resorted to reliance on the improper theory that diluted the burden of proof as to Petitioner's mens rea in order to convict.

REASONS FOR GRANTING THE PETITION

The Second Circuit's Application Of The Plain Error Test Was Inconsistent With Supreme Court Precedents Interpreting the Plain Error Rule; Moreover, There Is Confusion And Conflict In The Circuits As To The Appropriate Standard Of Review Where Mistaken Jury Instructions Regarding an Essential Element Broaden the Offense Charged in the Indictment and Create Alternative Theories Of Guilt, One Of Which Is Impermissible, Which Might Have Served As the Basis for The Jury's Verdict.

In *Stirone v. United States, supra*, this Court held that the Fifth Amendment's grand jury right is violated when the evidence adduced at trial, coupled with the trial court's instructions, amend the offense charged in the indictment by broadening the possible bases for conviction from that which appeared in the indictment. Such an error deprives an accused of a "basic right [and] is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *United States v. Miller*, 471 U.S. 130, 140, 105 S.Ct. 1811 (1985), quoting *Stirone*, 361 U.S. at 217, 80 S.Ct. at 273 (citations omitted). Accord, *Russell v. United States*, 369 U.S. 749, 770-771, 82 S.Ct. 1038 (1962).

At bar, the grand jury could not have returned an indictment charging Petitioner with transmitting money from within the United States to a place outside the United States with the intent to pro-

mote alien smuggling in violation of 8 U.S.C. § 1324(a)(1)(A). That is a non-existent crime under the charged money laundering statute. Yet, the effect of the instructional error in this case, by omitting the critical phrase "for financial gain,", and providing only the Title 8 definition of alien smuggling, created a new, invalid theory of prosecution which the jury could have, and likely did, embrace in returning its guilty verdict, given the notes sent during its deliberations.

In *Stromberg v. California*, *supra*, this Court held that where a jury returns a general verdict of guilty after a case is submitted on alternative theories, and one of the theories is invalid, the verdict cannot stand because a reviewing court cannot determine whether the jury convicted on the basis of the properly submitted theory. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories required that the conviction be set aside." *Sandstrom v. Montana*, 442 U.S. 510, 526, 99 S.Ct. 2450 (1979) (quoting *Leary v. United States*, *supra* 395 U.S. at 31-32 (1969)).

The instructional error in this case was not a mere omission or misdescription of an essential element of the offense, which might be subject to harmless error analysis. *See Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827 (1999). In *Neder*, the trial court omitted the essential element of materiality in a tax fraud prosecution, but *Neder* did not contend that the issue of materiality was in dispute, or that multiple theories had been submit-

ted to the jury. *Neder* and, in the context of plain error review of instructional errors, *Johnson v. United States*, *supra*, both stand for the proposition that there is a narrow class of cases where harmless error analysis of an instructional error is appropriate because the reviewing court can determine, beyond a reasonable doubt, that the verdict was fairly reached. Nowhere in *Neder* or in *Johnson* did this Court overrule the basic tenets of constitutional law that a court may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct.

Neither *Stirone* nor *Stromberg* have been overruled by this Court. This case affords the Court the opportunity to reaffirm the vitality of these prior precedents, and to emphasize that erroneous jury instructions which create an alternative, unconstitutional theory that a jury can possibly find from the evidence are qualitatively different from erroneous instructions which merely omit or misdescribe an element of the one otherwise proper theory submitted to the jury, when that element is undisputed or supported by overwhelming evidence. The reaffirmation of these principles is necessary because there is a conflict in the Circuit Courts' instructional error jurisprudence, as a result of this Court's *Neder* opinion, as to the standard of review to be used where an omission or misdescription of an element of the offense permits a conviction on an alternative invalid theory. Compare *United States v. Holly*, 488 F.3d 1298 (10th

Cir. 2007) (*Neder's* harmless error standard to be applied where reviewing court cannot determine whether defendant was convicted under an erroneous theory) with, *United States v. Lara*, 455 F.3d 1080 (9th Cir. 2006) (Absolute certainty, not harmless error standard, is the appropriate standard where reviewing court cannot determine whether defendant was convicted under an erroneous theory).

At bar, the Circuit Court held that "the requisite purpose of financial gain, though not alleged in so many words in the indictment, was consistent with, and implied by, its allegations regarding the fees demanded from the aliens. . . Given the overwhelming evidence that Ping knew such smuggling activities were engaged in for purposes of profit, any error in the charge was not only not plain, it was harmless. *See Napoli v. United States*, 32 F.3d 31, 36 (2d Cir. 1994)." However, the Second Circuit did not properly apply the plain error test, as this Court has applied it.

The plain error test under F.R.Cr.P. 52(b) for unobjected to errors requires that there be (1) error, (2) that is plain, and (3) that affects substantial rights. If these three prongs are met, an appellate court may exercise its discretion to notice the forfeited error if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993), *Johnson v. United States*, *supra*.

Contrary to the Second Circuit's finding, the issue in dispute as to the money laundering charge was *not* whether the indictment was facially sufficient or whether Petitioner knew, generally, that smuggling activities were engaged in for profit; it was whether Petitioner knew of, and intended to promote, Weng's first attempt at alien smuggling for profit at the time of her money transfer. As to the issue in dispute, this was for the jury, not the appellate court, to determine. Thus, plain error was committed.

As to the first prong, there is no doubt that the District Court committed error in failing to provide the proper definition of the term "alien smuggling" in the context of the charged money laundering statute. The government conceded the error, and the Circuit Court acknowledged it.

Notwithstanding the Second Circuit's decision, the second prong is no less difficult to find. *Olano* makes it clear that the word "plain" is synonymous with "clear" or "obvious." Here, the money laundering statute provided a definition of the type of alien smuggling which constituted a specified unlawful activity. Section (c)(7) of the statute refers to section 1961(1), which defines alien smuggling in subdivision (f) as "alien smuggling . . . committed for financial gain." This definition was plain then, and it was plain on appellate review. The only definition of alien smuggling provided to the jury was the wrong definition from the wrong statute. The error could not be plainer, and it was because the error was so plain that the government conceded it. For

the Second Circuit to find otherwise was simply inconsistent with the prior precedents of this Court.

As to the third prong, the plain error committed here created an alternative improper theory of conviction, which the jury apparently considered given the notes sent out during their deliberations. Thus, the plain error clearly affected the basic, substantial Fifth Amendment grand jury right and the right to due process of law, and the constitutional and Sixth Amendment rights to a jury trial.

Finally, the forfeited error in this case resulted in a miscarriage of justice, for Petitioner has been sentenced to twenty years under circumstances where it remains unclear whether the jury convicted her of the money laundering offense charged in the indictment. The evidence of Petitioner's intent was, at best, reed thin and, in order to convict, the jury would improperly have had to pile inference upon inference to conclude that Petitioner specifically intended to promote Weng's entry into the alien smuggling business. Since there was not a shred of evidence that Petitioner actually knew of Weng's purpose at the time she transmitted the funds on his behalf, the evidence adduced at trial, coupled with the erroneous instructions, permitted a conviction for a non-existent crime.

Relying on the evidence presented, a rational juror reasonably could have concluded that in March, 1991, Petitioner suspected, but did not know whether Weng's money transfer related to his

becoming an alien smuggler, so she joked with him in an effort to learn his purpose because she wanted to have her own relatives smuggled into the United States. Because Petitioner was aware that Weng's family members were still in China, and because the "going rate" to smuggle one alien into the United States was around 25,000, Petitioner thought that Weng was attempting to smuggle his wife, or another relative into the United States, needing 30,000 to pay the smuggling fee.

With this view of the evidence, coupled with the District Court's erroneous instructions, a rational juror could have convicted Petitioner on the improper theory that she transmitted money from the United States to Thailand on Weng's behalf with the specific intent to promote Weng's efforts to bring into this country a relative, not for financial gain, but for the personal reason of being reunited with his wife or other family member. The jury's notes, including its deadlock note, and notes asking about Weng's smuggling of his own relatives, clearly indicate that this may well have been the basis upon which Petitioner was convicted. There simply is no way that a reviewing court could find otherwise, without trampling on the constitutional right of an accused to have the jury, not the appellate court, find guilt beyond a reasonable doubt.

This was a highly publicized case, and the reversal of Petitioner's conviction would do much to demonstrate both here, and abroad, that the rule of law prevails in this country, and that the fairness and integrity of our judicial proceedings remain

sacrosanct regardless of who the accused is, or the crimes of which he or she has been accused. It also would reaffirm to the lower courts the fundamental constitutional principles relating to the importance of the basic, fundamental role of the properly instructed jury, as opposed to the increasing use of harmless error to excuse potentially invalid verdicts. The Second Circuit abused it discretion in failing to notice the instructional error in this case, and this Court should review and reverse Petitioner's conviction on the money laundering count and grant her a new trial on this count with a properly instructed jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 9, 2008

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, at 500 Pearl Street, in the City of New York, on the 19th day of November, two thousand seven.

Present: HON. JOSEPH M. MCLAUGHLIN,
HON. ROBERT A. KATZMANN,
Circuit Judges.
HON. NICHOLAS G. GARAUFIS,
*District Judge.**

06-1996-cr

UNITED STATES OF AMERICA,

Appellee,

– v. –

CHENG CHUI PING (a/k/a SISTER PING),

Defendant-Appellant.

For Defendant-Appellant:
JAY GOLBERG (Scott B. Tulman, Jared M. Lefkowitz, Susan G. Papano, *on the brief*) New York, NY.

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* The Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York, sitting by designation.

For Appellee:

LESLIE C. BROWN, Assistant United States Attorney (Diane Gujarati, Assistant United States Attorney, *on the brief*) *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Defendant Cheng Chui Ping ("Cheng") appeals from a judgment of conviction in the United States District Court for the Southern District of New York (Mukasey, *J.*).

Following a four-week jury trial, Cheng was convicted of (1) conspiracy to engage in alien smuggling, trafficking in ransom proceeds, hostage taking, and money laundering, in violation of 18 U.S.C. § 371 ("Count One"), (2) money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) ("Count Three"), and (3) trafficking in ransom proceeds, in violation of 18 U.S.C. § 1202 ("Count Five"). On appeal, she challenges the verdict only with respect to Counts Three and Five, raising various objections. We assume the parties' familiarity with the underlying facts and procedural history in this case.

As to Count Three, Cheng principally contends that the operative indictment filed against her was "constructively amended" because (due in part to her failure to object) the charge given to the jury on

this count did not instruct that where a conviction for money laundering is based on the specified unlawful activity of alien smuggling, such smuggling must be engaged in for the purpose of "financial gain." *See* 18 U.S.C. §§ 1956(c)(7)(A) & 1961(1)(F).

We have observed, in a related context, that the "focal point of the [money laundering] statute is the laundering process, not the underlying unlawful conduct that soiled the money." *United States v. Stavroulakis*, 952 F.2d 686, 691 (2d Cir. 1992). In this case, the jury was charged that it may only convict Cheng of money laundering if it found the evidence proved the specific unlawful activity charged in Count Three of the indictment, which specified the amount, date, and location of the transfer, and alleged that the purpose of the funds transfer was to promote the illegal activity "smuggling by airplane of four aliens." The requisite purpose of financial gain, its allegations regarding the fees demanded from the aliens. *See id.* at 693 (stating that we read an indictment "to include facts which are necessarily implied by the specific allegations made") (quotation marks omitted). Accordingly, we must reject the claim of a constructive amendment because we discern no risk that Cheng was either convicted of an offense that was not charged in the indictment or that she lacked sufficient notice to prepare for trial. *See United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992) (noting the case law regarding constructive amendment "permit[s] significant flexibility of proof, provided that the defendant was given notice of the 'core of criminality' to be proved at trial") (quotation marks omitted).

The more natural way to understand this argument is as a challenge to the jury charge. But were we to treat it as such, the result would be the same. Despite making various objections to the instruction on Count Three, Cheng's trial counsel did not preserve a valid objection on this ground. *See United States v. Lanza*, 790 F.2d 1015, 1021 (2d Cir. 1986) (observing that the objecting party must point to "the precise contention now being urged upon appeal"). Our review is therefore limited to whether the omission constituted plain error, *i.e.*, "an error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Tillem*, 906 F.2d 814, 925 (2d Cir. 1990). Given the overwhelming evidence that Ping knew such smuggling activities were engaged in for purposes of profit, any error in the charge was not only not plain, it was harmless. *See Napoli v. United States*, 32 F.3d 31, 36 (2d Cir. 1994).

Cheng also challenged the "conscious avoidance" charge given by the district court on the ground that it lacks a sufficient factual predicate. *See generally United States v. Nektalov*, 461 F.3d 309, 316 (2d Cir. 2006). Although, once again, she did not object to this aspect of the charge below, we find that the instruction was appropriate judged by any standard. Among other evidence, the jury heard testimony that Cheng joked with the person for whom she made the transfer that he had become one of her competitors in the smuggling trade. Assuming, *arguendo*, that this testimony failed to establish Cheng *knew* the transfer would promote alien smuggling, it suggest-

ed at least that she "suspected, but was not completely certain" of it, yet "deliberately avoided asking any questions . . . that might have confirmed [her] suspicions." *Id.* at 317.

Such testimony, viewed in the larger context of the government's case, serves as well to defeat Cheng's final challenge to Count Three that no "rational trier of fact could have found the . . . elements of [Count Three] beyond a reasonable doubt." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Cheng presses on appeal that the evidence failed to demonstrate that she knew at the time that the smuggling involved was pursued for financial gain. But as discussed, *supra*, the record at trial was replete with evidence that these smuggling rings were operated as commercial enterprises.

Lastly, we conclude that Cheng has not carried the "heavy burden" of demonstrating that the evidence was insufficient to support a conviction on Count Five. *Id.* As Judge Mukasey noted, "holding smuggled aliens against their will until their passage was paid was a uniform feature" of the alien smuggling business, a fact that would surely have been known to Cheng given her own experience with the practice. A reasonable juror could therefore have found that Cheng knew, even without having to ask, that the funds being transferred by relatives in China were functioning as ransom. *See United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005) ("The law . . . recognizes that the *mens rea* elements of knowledge and intent can often be proved through circum-

stantial evidence and the reasonable inferences drawn therefrom.").

We have carefully considered the appellant's remaining arguments and find them to be without merit. The judgment of the district court is therefore **AFFIRMED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By: _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse
40 Foley Square, New York, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF THE COURT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of February, two thousand eight.

Present: Hon. Joseph M. McLaughlin,
Hon. Robert A. Katzmann,
Circuit Judges.
Hon. Nicholas G. Garaufis,
District Judge.

Order No. 06-1996-cr
Filed February 11, 2008

UNITED STATES OF AMERICA,

Appellee,

v.

CHENG CHUI PING (a/k/a SISTER PING),

Defendant-Appellant.

Cheng Chui Ping, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: JOY FALLEL
Motion Staff Attorney

COUNT THREE

THE APPROPRIATE INSTRUCTION	THE COURT'S INSTRUCTION
18 U.S.C. 1956(a)(2)((A)	18 U.S.C. 1956(a)(2)((A)
(2) Whoever transports, transmits or transfers, or attempts to place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—	(2) Whoever transports, transmits or transfers, or attempts to place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
(A) with the intent to promote the carrying on of **specified unlawful activity;**	(A) with the intent to promote the carrying on of **specified unlawful activity;**
18 U.S.C. 1956(C)(7)	
(7) the term **"specified unlawful activity"** means—	The term specified unlawful activity means—
(D) **section 1203** (relating to hostage taking)	**18 U.S.C. 1203** (relating to hostage taking)
(A) any act or activity constituting an offense **listed in section 1961(1)** of this title . . .	

18 U.S.C. 1961(1)	
As used in this chapter— (1) "racketeering activity" means (F) any act which is indictable under the **Immigration and Nationality Act, section 274** (relating to bringing in and harboring certain aliens) . . . **if the act indictable under such section of such act was committed for the purpose of financial gain.**	
18 U.S.C. 1324(a)(1)(A)	**18 U.S.C. 1324(a)(1)(A)**
(1)(A) Any person who— (i) knowing that a person is an alien, brings to . . . the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, ... **for the purpose of financial gain** shall be (guilty of a crime).	(1)(A) Any person who— (i) knowing that a person is an alien, brings to . . . the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, ... shall be (guilty of a crime). **[NO MENTION OF FINANCIAL GAIN]**

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[Laws in effect as of January 24, 2002]
[Document not affected by Public Laws enacted
between January 24, 2002 and December 19, 2002]
[CITE: 18USC1956]

TITLE 18—
CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

CHAPTER 95—RACKETEERING

Sec. 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control

of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation,

transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.—

(1) In general.—Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.—For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and—

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.—A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.—

(A) In general.—A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.—A Federal Receiver described in subparagraph (A)—

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant—

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer

between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes—

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978));[1]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving—

(I) an item controlled on the United States Munitions List established under

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[1] So in original. The second closing parenthesis probably should not appear.

section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling

goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(l) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006[2] (relating to fraudulent Federal credit institution entries), 1007[2] (relating to Federal Deposit Insurance transactions), 1014[2] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032[2] (relating to concealment of assets

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[2] So in original. Probably should be preceded by "section."

from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A or 2339B (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relat-

ing to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, or any felony violation of the Foreign Corrupt Practices Act;

environmental crimes

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of Conviction of Financial Institutions.—If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.—(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in

any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

(Added Pub. L. 99-570, title I, Sec. 1352(a), Oct. 27, 1986, 100 Stat. 3207-18; amended Pub. L. 100-690, title VI, Secs. 6183, 6465, 6466, 6469(a)(1), 6471(a), (b), title VII, Sec. 7031, Nov. 18, 1988, 102 Stat. 4354, 4375, 4377, 4378, 4398; Pub. L. 101-647, title I, Secs. 105-108, title XII, Sec. 1205(j), title XIV, Secs. 1402, 1404, title XXV, Sec. 2506, title XXXV, Sec. 3557, Nov. 29, 1990, 104 Stat. 4791, 4792, 4831, 4835, 4862, 4927; Pub. L. 102-550, title XV, Secs. 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534, 1536, Oct. 28, 1992, 106 Stat. 4055, 4064-4067; Pub. L. 103-322, title XXXII, Sec. 320104(b), title XXXIII, Secs. 330008(2), 330011(l), 330012, 330019, 330021(1), Sept. 13, 1994, 108 Stat. 2111, 2142, 2145, 2146, 2149, 2150; Pub. L. 103-325, title IV, Secs. 411(c)(2)(E), 413(c)(1), (d), Sept. 23, 1994, 108 Stat. 2253-2255; Pub. L. 104-132, title VII, Sec. 726, Apr. 24, 1996, 110 Stat. 1301; Pub. L. 104-191, title II, Sec. 246, Aug. 21, 1996, 110 Stat. 2018; Pub. L. 104-294, title VI, Secs. 601(f)(6), 604(b)(38), Oct. 11, 1996, 110 Stat. 3499, 3509; Pub. L. 106-569, title VII, Sec. 709(a), Dec. 27, 2000, 114 Stat. 3018; Pub. L. 107-56, title III, Secs. 315, 317, 318,

376, title VIII, Sec. 805(b), title X, Sec. 1004, Oct. 26, 2001, 115 Stat. 308, 310, 311, 342, 378, 392; Pub. L. 107-273, div. B, title IV, Secs. 4002(a)(11), (b)(5), (c)(2), 4005(d)(1), (e), Nov. 2, 2002, 116 Stat. 1807, 1809, 1812, 1813.)

References in Text

Sections 7201 and 7206 of the Internal Revenue Code of 1986, referred to in subsec. (a)(1)(A)(ii), are classified, respectively, to sections 7201 and 7206 of Title 26, Internal Revenue Code.

The Federal Rules of Civil Procedure, referred to in subsec. (b)(2), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The Controlled Substances Act, referred to in subsec. (c)(7)(B)(i), (D), is title II of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (Sec. 801 et seq.) of chapter 13 of Title 21, Food and Drugs. Section 422 of the Act is classified to section 863 of Title 21. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Chemical Diversion and Trafficking Act of 1988, referred to in subsec. (c)(7)(D), is subtitle A (Sec. 6051-6061) of title VI of Pub. L. 100-690, Nov. 18, 1988, 102 Stat. 4312. For complete classification of subtitle A to the Code, see Short Title of 1988 Amendment note set out under section 801 of Title 21, Food and Drugs, and Tables.

Section 38(c) of the Arms Export Control Act, referred to in subsec. (c)(7)(D), is classified to sec-

tion 2778(c) of Title 22, Foreign Relations and Intercourse.

Section 11 of the Export Administration Act of 1979, referred to in subsec. (c)(7)(D), is classified to section 2410 of Title 50, Appendix, War and National Defense.

Section 206 of the International Emergency Economic Powers Act, referred to in subsec. (c)(7)(D), is classified to section 1705 of Title 50.

Section 16 of the Trading with the Enemy Act, referred to in subsec. (c)(7)(D), is classified to section 16 of Title 50, Appendix.

Section 15 of the Food Stamp Act of 1977, referred to in subsec. (c)(7)(D), is classified to section 2024 of Title 7, Agriculture.

Section 543(a)(1) of the Housing Act of 1949, referred to in subsec. (c)(7)(D), is classified to section 1490s(a)(1) of Title 42, The Public Health and Welfare.

The Foreign Agents Registration Act of 1938, referred to in subsec. (c)(7)(D), is act June 8, 1938, ch. 327, 52 Stat. 631, as amended, which is classified generally to subchapter II (Sec. 611 et seq.) of chapter 11 of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 611 of Title 22 and Tables.

The Foreign Corrupt Practices Act, referred to in subsec. (c)(7)(D), probably means the Foreign Corrupt Practices Act of 1977, title I of Pub. L. 95-213, Dec. 19, 1977, 91 Stat. 1494, as amended, which enacted sections 78dd-1 to 78dd-3 of Title 15, Commerce and Trade, and amended sections 78m and

78ff of Title 15. For complete classification of this Act to the Code, see Short Title of 1977 Amendment note set out under section 78a of Title 15 and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (c)(7)(E), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92-500, Sec. 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (Sec. 1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The Ocean Dumping Act, referred to in subsec. (c)(7)(E), probably means title I of the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 92-532, Oct. 23, 1972, 86 Stat. 1053, as amended, which is classified generally to subchapter I (Sec. 1411 et seq.) of chapter 27 of Title 33. For complete classification of title I to the Code, see Tables.

The Act to Prevent Pollution from Ships, referred to in subsec. (c)(7)(E), is Pub. L. 96-478, Oct. 21, 1980, 94 Stat. 2297, as amended, which is classified principally to chapter 33 (Sec. 1901 et seq.) of Title 33. For complete classification of this Act to the Code, see Short Title note set out under section 1901 of Title 33 and Tables.

The Safe Drinking Water Act, referred to in subsec. (c)(7)(E), is title XIV of act July 1, 1944, as added Dec. 16, 1974, Pub. L. 93-523, Sec. 2(a), 88 Stat. 1660, as amended, which is classified generally to subchapter XII (Sec. 300f et seq.) of chapter

6A of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 201 of Title 42 and Tables.

The Resources Conservation and Recovery Act, referred to in subsec. (c)(7)(E), probably means the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, Oct. 21, 1976, 90 Stat. 2796, as amended, which is classified generally to chapter 82 (Sec. 6901 et seq.) of Title 42. For complete classification of this Act to the Code, see Short Title of 1976 Amendment note set out under section 6901 of Title 42 and Tables.

Amendments

2002—Subsec. (c)(6)(B). Pub. L. 107-273, Sec. 4005(d)(1), substituted semicolon for period at end.

Subsec. (c)(7)(B)(ii). Pub. L. 107-273, Sec. 4002-(b)(5)(A), realigned margins.

Subsec. (c)(7)(D). Pub. L. 107-273, Sec. 4005(e), repealed Pub. L. 107-56, Sec. 805(b). See 2001 Amendment note below.

Pub. L. 107-273, Sec. 4002(c)(2), substituted "services)," for "services)," and "Code," for "Code,".

Pub. L. 107-273, Sec. 4002(b)(5)(B), struck out "or" at end.

Pub. L. 107-273, Sec. 4002(a)(11), made technical corrections to directory language of Pub. L. 104-132, Sec. 726(2). See 1996 Amendment note below.

Subsec. (c)(7)(E). Pub. L. 107-273, Sec. 4002(b)-(5)(C), substituted "; or" for period at end.

Subsec. (c)(7)(F). Pub L. 107-273, Sec. 4002(b)-(5)(D), substituted "any" for "Any" and semicolon for period at end.

2001—Subsec. (b). Pub. L. 107-56, Sec. 317, inserted subsec. heading, designated existing provisions as par. (1), inserted heading and inserted ", or section 1957" after "or (a)(3)": in introductory provisions, redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, of par. (1), realigned margins, and added pars. (2) to (4).

Subsec. (c)(6). Pub. L. 107-56, Sec. 318, added par. (6) and struck out former par. (6) which read as follows: "the term `financial institution' has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;".

Subsec. (c)(7)(B). Pub. L. 107-56, Sec. 315(1), substituted "destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16)" for "or destruction of property by means of explosive or fire" in cl. (ii), inserted a closing parenthesis after "1978" in cl. (iii), and added cls. (iv) to (vi).

Subsec. (c)(7)(D). Pub. L. 107-56, Sec. 376, inserted "or 2339B" after "2339A". Pub. L. 107-56, Sec. 805(b), which amended subpar. (D) identically, was repealed by Pub. L. 107-273, Sec. 4005(e).

Pub. L. 107-56, Sec. 315(2), inserted "section 541 (relating to goods falsely classified)," before "section 542", "section 922(l) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking)," before "section 956", "section 1030 (relating to computer fraud and abuse),"

before "1032", and "any felony violation of the Foreign Agents Registration Act of 1938," before "or any felony violation of the Foreign Corrupt Practices Act".

Subsec. (i). Pub. L. 107-56, Sec. 1004, added subsec. (i).

2000—Subsec. (c)(7)(D). Pub. L. 106-569 inserted "any violation of section 543(a)(1) of the Housing Act of 1949 (relating to equity skimming)," after "coupons having a value of not less than $5,000,".

1996—Subsec. (c)(7)(B)(ii). Pub. L. 104-132, Sec. 726(1), amended cl. (ii) generally. Prior to amendment, cl. (ii) read as follows: "kidnapping, robbery, or extortion; or".

Subsec. (c)(7)(B)(iii). Pub. L. 104-294, Sec. 601(f)-(6), struck out one closing parenthesis after "1978".

Subsec. (c)(7)(D). Pub. L. 104-294, Sec. 604(b)-(38), amended directory language of Pub. L. 103-322, Sec. 320104(b). See 1994 Amendment note below.

Pub. L. 104-132, Sec. 726(2), as amended by Pub. L. 107-273, Sec. 4002(a)(11), inserted "section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member)," after "an offense under", "section 351 (relating to congressional or Cabinet officer assassination)," after "section 215 (relating to commissions or gifts for procuring loans),", "section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of

Government property or property affecting interstate or foreign commerce)," after "798 (relating to espionage),", "section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country)," after "section 875 (relating to interstate communications),", "section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons)," after "1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution),", "section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction)," after "section 1203 (relating to hostage taking),", "section 1751 (relating to Presidential assassination)," after "1708 (theft from the mail),", "section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms)," after "2114 (relating to bank and postal robbery and theft),", and substituted "section 2320" for "or section 2320" and", section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code," for "of this title".

Subsec. (c)(7)(F). Pub. L. 104-191 added subpar. (F).

1994—Subsec. (a)(2). Pub. L. 103-325, Sec. 413-(c)(1)(A)(ii), substituted "transfer" for "transfer." in concluding provisions and two times in subpar. (B).

Pub. L. 103-322, Sec. 330019(a)(3), and Pub. L. 103-325, Sec. 413(c)(1)(A)(i), amended par. (2) identically, inserting "not more than" before "$500,000" in concluding provisions.

Subsec. (b). Pub. L. 103-325, Sec. 413(c)(1)(B), inserted "or (a)(3)" after "(a)(1)" and substituted "transfer" for "transfer."

Subsec. (c)(7)(B)(ii). Pub. L. 103-322, Sec. 330021(1), substituted "kidnapping" for "kidnaping".

Subsec. (c)(7)(B)(iii). Pub. L. 103-322, Sec. 330019(a)(1), and Pub. L. 103-325, Sec. 413(c)(1)-(C), each amended cl. (iii) by inserting a closing parenthesis after "1978".

Subsec. (c)(7)(D). Pub. L. 103-322, Sec. 330019(b), and Pub. L. 103-325, Sec. 413(c)(1)(D), amended subpar. (D) identically, substituting "section 15 of the Food Stamp Act of 1977" for "section 9(c) of the Food Stamp Act of 1977".

Pub. L. 103-322, Sec. 330011(l), and Pub. L. 103-325, Sec. 413(d), made identical amendments repealing Pub. L. 101-647, Sec. 3557(2)(E).

See 1990 Amendment note below.

Pub. L. 103-322, Sec. 320104(b), as amended by Pub. L. 104-294, Sec. 604(b)(38), substituted "section 2319 (relating to copyright infringement), or section 2320 (relating to trafficking in counterfeit

goods and services)," for "or section 2319 (relating to copyright infringement)".

Subsec. (c)(7)(E). Pub. L. 103-322, Sec. 330012, and Pub. L. 103-325, Sec. 413(c)(1)(E), amended subpar. (E) identically, striking out second period at end.

Subsec. (e). Pub. L. 103-322, Sec. 330008(2), and Pub. L. 103-325, Sec. 413(c)(1)(F), amended subsec. (e) identically, substituting "Environmental Protection Agency" for "Environmental Protection Agency".

Subsec. (g). Pub. L. 103-325, Sec. 411(c)(2)(E), in subsec. (g) relating to notice of conviction of financial institutions, substituted "section 5322 or 5324 of title 31" for "section 5322 of title 31".

Pub. L. 103-322, Sec. 330019(a)(2), and Pub. L. 103-325, Sec. 413(c)(1)(G), made identical amendments redesignating subsec. (g) relating to penalty for money laundering conspiracies as (h).

Subsec. (h). Pub. L. 103-322, Sec. 330019(a)(2), and Pub. L. 103-325, Sec. 413(c)(1)(G), made identical amendments redesignating subsec. (g) relating to penalty for money laundering conspiracies as (h).

1992—Subsec. (a)(2). Pub. L. 102-550, Sec. 1531(a), substituted "transportation, transmission, or transfer." for "transportation" wherever appearing in subpar. (B) and concluding provisions.

Subsec. (a)(3). Pub. L. 102-550, Sec. 1531(b), in concluding provisions, substituted "property represented to be the proceeds" for "property represented by a law enforcement officer to be the proceeds".

Subsec. (b). Pub. L. 102-550, Sec. 1531(a), substituted "transportation, transmission, or transfer." for "transportation" in introductory provisions.

Subsec. (c)(3). Pub. L. 102-550, Sec. 1527(a)(2), inserted "use of a safe deposit box," before "or any other payment".

Subsec. (c)(4)(A). Pub. L. 102-550, Sec. 1527(a)-(1), added clause (iii), struck out "which in any way or degree affects interstate or foreign commerce," after "or aircraft," and inserted "which in any way or degree affects interstate or foreign commerce" after "(A) or transaction".

Subsec. (c)(6). Pub. L. 102-550, Sec. 1526(a), substituted "or the regulations" for "and the regulations".

Subsec. (c)(7)(B). Pub. L. 102-550, Sec. 1536, designated part of existing provisions as cl. (i) and added cls. (ii) and (iii).

Subsec. (c)(7)(D). Pub. L. 102-550, Secs. 1524, 1534(1), (2), struck out "1341 (relating to mail fraud) or section 1343 (relating to wire fraud) affecting a financial institution, section 1344 (relating to bank fraud)," after "hostage taking),", inserted "section 1708 (theft from the mail)," before "section 2113", substituted "section 422 of the Controlled Substances Act" for "section 1822 of the Mail Order Drug Paraphernalia Control Act (100 Stat. 3207-51; 21 U.S.C. 857)", and struck out "or" before "section 16".

Pub. L. 102-550, Sec. 1534(3), which directed insertion of ", any felony violation of section 9(c) of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a

value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act" before semicolon, was executed by making insertion before semicolon at end to reflect the probable intent of Congress.

Subsec. (g). Pub. L. 102-550, Sec. 1530, added subsec. (g) relating to penalty for money laundering conspiracies.

Pub. L. 102-550, Sec. 1504(c), added subsec. (g) relating to notice of conviction of financial institutions.

1990—Subsec. (a)(2). Pub. L. 101-647, Sec. 108(1), inserted at end "For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true."

Subsec. (a)(3). Pub. L. 101-647, Sec. 108(2), inserted "and paragraph (2)" after "this paragraph" in last sentence.

Subsec. (c)(1). Pub. L. 101-647, Sec. 106, substituted "State, Federal, or foreign" for "State or Federal".

Subsec. (c)(4). Pub. L. 101-647, Sec. 1402, inserted "(A)" before "a transaction" the first place it appears, "(B)" before "a transaction" the second place it appears, "(i)" before "involving" the first place it appears, and "(ii)" before "involving" the second place it appears.

Subsec. (c)(5). Pub. L. 101-647, Sec. 105, amended par. (5) generally. Prior to amendment, par. (5) read as follows: "the term 'monetary instruments' means coin or currency of the United States or of any other country, travelers" checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery;".

Subsec. (c)(7)(A). Pub. L. 101-647, Sec. 3557(1), substituted "subchapter II of chapter 53 of title 31" for "the Currency and Foreign Transactions Reporting Act".

Subsec. (c)(7)(C). Pub. L. 101-647, Sec. 1404(a)-(1), struck out "or" at end.

Subsec. (c)(7)(D). Pub. L. 101-647, Sec. 3557(2)-(A)-(D), substituted "section 2113" for "or section 2113", substituted "theft), or" for "theft) of this title,", inserted "of this title" after "2319 (relating to copyright infringement)", and substituted "paraphernalia" for "paraphernalia".

Pub. L. 101-647, Sec. 3557(2)(E), which directed the amendment of subpar. (D) by striking the final period, was repealed by Pub. L. 103-322, Sec. 330011(l), and Pub. L. 103-325, Sec. 413(d).

Pub. L. 101-647, Sec. 2506(2), inserted "section 1341 (relating to mail fraud) or section 1343 (relating to wire fraud) affecting a financial institution," after "section 1203 (relating to hostage taking),".

Pub. L. 101-647, Sec. 2506(1), inserted "section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution

entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution)," after "section 875 (relating to interstate communications),".

Pub. L. 101-647, Sec. 1404(a)(2), inserted "; or" after "Trading with the Enemy Act" at end.

Pub. L. 101-647, Sec. 107, substituted "a felony violation of the Chemical Diversion and Trafficking Act of 1988" for "section 310 of the Controlled Substances Act (21 U.S.C. 830)".

Subsec. (c)(7)(E). Pub. L. 101-647, Sec. 1404(a)-(2), amended par. (7) by inserting "; or" and subpar. (E) before the period.

Subsec. (c)(8). Pub. L. 101-647, Sec. 1205(j), added par. (8).

Subsec. (e). Pub. L. 101-647, Sec. 1404(b), inserted at end "Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental [sic] Protection Agency."

1988—Subsec. (a)(1)(A). Pub. L. 100-690, Sec. 6471(a), amended subpar. (A) generally, designating existing provisions as cl. (i) and adding cl. (ii).

Subsec. (a)(2). Pub. L. 100-690, Sec. 6471(b), substituted "transports, transmits, or transfers, or attempts to transport, transmit, or transfer" for

"transports or attempts to transport" in introductory provisions.

Subsec. (a)(3). Pub. L. 100-690, Sec. 6465, added par. (3).

Subsec. (c)(7)(D). Pub. L. 100-690, Sec. 7031, substituted "section 513" for "section 511" and "section 545" for "section 543" and inserted "section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies),".

Pub. L. 100-690, Sec. 6466, inserted "section 542 (relating to entry of goods by means of false statements),", "section 549 (relating to removing goods from Customs custody),", and "section 2319 (relating to copyright infringement), section 310 of the Controlled Substances Act (21 U.S.C. 830) (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 1822 of the Mail Order Drug Paraphernalia Control Act (100 Stat. 3207-51; 21 U.S.C. 857) (relating to transportation of drug paraphernalia [sic]),".

Pub. L. 100-690, Sec. 6183, substituted "section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, or section 16 (relating to offenses and punishment) of the Trading with the Enemy Act." for "section 38 of the Arms Export Control Act (22 U.S.C. 2778), section 2 (relating to criminal penalties) of the Export Administration Act of 1979 (50 U.S.C. App. 2401),

section 203 (relating to criminal sanctions) of the International Emergency Economic Powers Act (50 U.S.C. 1702), or section 3 (relating to criminal violations) of the Trading with the Enemy Act (50 U.S.C. App. 3)".

Subsec. (e). Pub. L. 100-690, Sec. 6469(a)(1), substituted "and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General." for ". Such authority of the Secretary of the Treasury shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General."

Effective Date of 2002 Amendment

Pub. L. 107-273, div. B, title IV, Sec. 4002(a)(11), Nov. 2, 2002, 116 Stat. 1807, provided that the amendment made by section 4002(a)(11) is effective Apr. 24, 1996.

Pub. L. 107-273, div. B, title IV, Sec. 4005(e), Nov. 2, 2002, 116 Stat. 1813, provided that the amendment made by section 4005(e) is effective Oct. 26, 2001.

Termination Date of 2001 Amendment

Amendments by title III of Pub. L. 107-56 to terminate effective on and after the first day of fiscal year 2005 if Congress enacts a joint resolution that

such amendments no longer have the force of law, see section 303 of Pub. L. 107-56, set out as a Four-Year Congressional Review; Expedited Consideration note under section 5311 of Title 31, Money and Finance.

Effective Date of 1996 Amendment

Amendment by section 604(b)(38) of Pub. L. 104-294 effective Sept. 13, 1994, see section 604(d) of Pub. L. 104-294, set out as a note under section 13 of this title.

Effective Date of 1994 Amendments

Section 330011(l) of Pub. L. 103-322 and section 413(d) of Pub. L. 103-325 provided that the repeal of section 3557(2)(E) of Pub. L. 101-647 made by those sections is effective as of the date of enactment of Pub. L. 101-647, which was approved Nov. 29, 1990.

Section Referred to in Other Sections

This section is referred to in sections 981, 982, 986, 1510, 1952, 1957, 1961, 2332d, 2516, 3322 of this title; title 8 sections 1101, 1182; title 12 sections 93, 1464, 1772d, 1785, 1786, 1818, 1821, 1829, 3105, 3413, 3420; title 19 section 1583; title 22 section 2714; title 26 section 6050I; title 28 sections 524, 2467; title 31 sections 5328, 9703.

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TITLE 18—
CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec. 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is

felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate

transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds),

(D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(Added Pub. L. 91-452, title IX, Sec. 901(a), Oct. 15, 1970, 84 Stat. 941; amended Pub. L. 95-575, Sec. 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub. L. 95-598, title III, Sec. 314(g), Nov. 6, 1978, 92 Stat. 2677; Pub. L. 98-473, title II, Secs. 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub. L. 98-547, title II, Sec. 205, Oct. 25, 1984, 98 Stat. 2770; Pub. L. 99-570, title I, Sec. 1365(b), Oct. 27, 1986, 100 Stat. 3207-35; Pub. L. 99-646, Sec. 50(a), Nov. 10, 1986, 100 Stat. 3605; Pub. L. 100-690, title VII, Secs. 7013, 7020(c), 7032, 7054, 7514, Nov. 18, 1988, 102 Stat. 4395, 4396, 4398, 4402, 4489; Pub. L. 101-73, title IX, Sec. 968, Aug. 9, 1989, 103 Stat. 506; Pub. L. 101-647, title XXXV, Sec. 3560, Nov. 29, 1990,

104 Stat. 4927; Pub. L. 103-322, title IX, Sec. 90104, title XVI, Sec. 160001(f), title XXXIII, Sec. 330021(1), Sept. 13, 1994, 108 Stat. 1987, 2037, 2150; Pub. L. 103-394, title III, Sec. 312(b), Oct. 22, 1994, 108 Stat. 4140; Pub. L. 104-132, title IV, Sec. 433, Apr. 24, 1996, 110 Stat. 1274; Pub. L. 104-153, Sec. 3, July 2, 1996, 110 Stat. 1386; Pub. L. 104-208, div. C, title II, Sec. 202, Sept. 30, 1996, 110 Stat. 3009-565; Pub. L. 104-294, title VI, Secs. 601(b)(3), (i)(3), 604(b)(6), Oct. 11, 1996, 110 Stat. 3499, 3501, 3506; Pub. L. 107-56, title VIII, Sec. 813, Oct. 26, 2001, 115 Stat. 382; Pub. L. 107-273, div. B, title IV, Sec. 4005(f)(1), Nov. 2, 2002, 116 Stat. 1813.)

References in Text

Section 102 of the Controlled Substances Act, referred to in par. (1)(A), (D), is classified to section 802 of Title 21, Food and Drugs.

The Currency and Foreign Transactions Reporting Act, referred to in par. (1)(E), is title II of Pub. L. 91-508, Oct. 26, 1970, 84 Stat. 1118, which was repealed and reenacted as subchapter II of chapter 53 of Title 31, Money and Finance, by Pub. L. 97-258, Sec. 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31.

The Immigration and Nationality Act, referred to in par. (1)(F), is act June 27, 1952, ch. 477, 66 Stat. 163, as amended, which is classified principally to chapter 12 (Sec. 1101 et seq.) of Title 8, Aliens and Nationality. Sections 274, 277, and 278 of the Act are classified to sections 1324, 1327, and 1328 of

Title 8, respectively. For complete classification of this Act to the Code, see Short Title note set out under section 1101 of Title 8 and Tables.

The effective date of this chapter, referred to in par. (5), is Oct. 15, 1970.

Amendments

2002—Par. (1)(G). Pub. L. 107-273 made technical amendment to directory language of Pub. L. 107-56. See 2001 Amendment note below.

2001—Par. (1)(G). Pub. L. 107-56, as amended by Pub. L. 107-273, which directed addition of cl. (G) before period at end, was executed by making the addition before the semicolon at end to reflect the probable intent of Congress.

1996—Par. (1)(B). Pub. L. 104-294, Sec. 604(b)-(6), amended directory language of Pub. L. 103-322, Sec. 160001(f). See 1994 Amendment note below.

Pub. L. 104-294, Sec. 601(i)(3), substituted "2260" for "2258".

Pub. L. 104-208 struck out "if the act indictable under section 1028 was committed for the purpose of financial gain" before ", section 1029", inserted "section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers)," after "section 1344 (relating to financial institution fraud),", struck out "if the act indictable under section 1542 was committed for the purpose of financial gain" before ", section 1543", "if the act

indictable under section 1543 was committed for the purpose of financial gain" before ", section 1544", "if the act indictable under section 1544 was committed for the purpose of financial gain" before ", section 1546", and "if the act indictable under section 1546 was committed for the purpose of financial gain" before ", sections 1581-1588".

Pub. L. 104-153 inserted ", section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks)" after "sections 2314 and 2315 (relating to interstate transportation of stolen property)".

Pub. L. 104-132, Sec. 433(1), (2), inserted "section 1028 (relating to fraud and related activity in connection with identification documents) if the act indictable under section 1028 was committed for the purpose of financial gain," before "section 1029" and "section 1542 (relating to false statement in application and use of passport) if the act indictable under section 1542 was committed for the purpose of financial gain, section 1543 (relating to forgery or false use of passport) if the act indictable under section 1543 was committed for the purpose of financial gain, section 1544 (relating to misuse of passport) if the act indictable under

section 1544 was committed for the purpose of financial gain, section 1546 (relating to fraud and misuse of visas, permits, and other documents) if the act indictable under section 1546 was committed for the purpose of financial gain, sections 1581-1588 (relating to peonage and slavery)," after "section 1513 (relating to retaliating against a witness, victim, or an informant),".

Par. (1)(D). Pub. L. 104-294, Sec. 601(b)(3), substituted "section 157 of this title" for "section 157 of that title".

Par. (1)(F). Pub. L. 104-132, Sec. 433(3), (4), which directed addition of cl. (F) before period at end, was executed by making the addition before the semicolon at end to reflect the probable intent of Congress.

1994—Par. (1)(A). Pub. L. 103-322, Sec. 330021(1), substituted "kidnapping" for "kidnaping".

Pub. L. 103-322, Sec. 90104, substituted "a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act)" for "narcotic or other dangerous drugs".

Par. (1)(B). Pub. L. 103-322, Sec. 160001(f), as amended by Pub. L. 104-294, Sec. 604(b)(6), substituted "2251, 2251A, 2252, and 2258" for "2251-2252".

Par. (1)(D). Pub. L. 103-394 inserted "(except a case under section 157 of that title)" after "title 11".

Pub. L. 103-322, Sec. 90104, substituted "a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act)" for "narcotic or other dangerous drugs".

1990—Par. (1)(B). Pub. L. 101-647 substituted "section 1029 (relating to" for "section 1029 (relative to" and struck out "sections 2251 through 2252 (relating to sexual exploitation of children)," before", section 1958".

1989—Par. (1). Pub. L. 101-73 inserted "section 1344 (relating to financial institution fraud)," after "section 1343 (relating to wire fraud),".

1988—Par. (1)(B). Pub. L. 100-690, Sec. 7514, inserted "sections 2251 through 2252 (relating to sexual exploitation of children),".

Pub. L. 100-690, Sec. 7054, inserted ", section 1029 (relative to fraud and related activity in connection with access devices)" and ", section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children)".

Pub. L. 100-690, Sec. 7032, substituted "section 2321" for "section 2320".

Pub. L. 100-690, Sec. 7013, made technical amendment to directory language of Pub. L. 99-646. See 1986 Amendment note below.

Par. (10). Pub. L. 100-690, Sec. 7020(c), inserted "the Associate Attorney General of the United States," after "Deputy Attorney General of the United States,".

1986—Par. (1)(B). Pub. L. 99-646, as amended by Pub. L. 100-690, Sec. 7013, inserted "section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant)," after "section 1511 (relating to the obstruction of State or local law enforcement),".

Pub. L. 99-570 inserted "section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity),".

1984—Par. (1)(A). Pub. L. 98-473, Sec. 1020(1), inserted "dealing in obscene matter," after "extortion,".

Par. (1)(B). Pub. L. 98-547 inserted "sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles)," and "section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts),".

Pub. L. 98-473, Sec. 1020(2), inserted "sections 1461-1465 (relating to obscene matter),".

Par. (1)(E). Pub. L. 98-473, Sec. 901(g), added cl. (E).

1978—Par. (1)(B). Pub. L. 95-575 inserted "sections 2341-2346 (relating to trafficking in contraband cigarettes),".

Par. (1)(D). Pub. L. 95-598 substituted "fraud connected with a case under title 11" for "bankruptcy fraud".

Effective Date of 2002 Amendment

Pub. L. 107-273, div. B, title IV, Sec. 4005(f)(1), Nov. 2, 2002, 116 Stat. 1813, provided that the amendment made by section 4005(f)(1) is effective Oct. 26, 2001.

Effective Date of 1996 Amendment

Amendment by section 604(b)(6) of Pub. L. 104-294 effective Sept. 13, 1994, see section 604(d) of Pub. L. 104-294, set out as a note under section 13 of this title.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103-394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under Title 11, Bankruptcy, before Oct. 22, 1994, see section 702 of Pub. L. 103-394, set out as a note under section 101 of Title 11.

Effective Date of 1978 Amendments

Amendment by Pub. L. 95-598 effective Oct. 1, 1979, see section 402(a) of Pub. L. 95-598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

Amendment by Pub. L. 95-575 effective Nov. 2, 1978, see section 4 of Pub. L. 95-575, set out as an Effective Date note under section 2341 of this title.

Short Title of 1984 Amendment

Section 301 of chapter III (Secs. 301-322) of title II of Pub. L. 98-473 provided that: "This title [probably means this chapter, enacting sections 1589, 1600, 1613a, and 1616 of Title 19, Customs Duties and sections 853, 854, and 970 of Title 21, Food and Drugs, amending section 1963 of this title and sections 1602, 1605, 1606, 1607, 1608, 1609, 1610,

1611, 1612, 1613, 1614, 1615, 1618, 1619, and 1644 of Title 19, sections 824, 848, and 881 of Title 21, and section 524 of Title 28, Judiciary and Judicial Procedure, and repealing section 7607 of Title 26, Internal Revenue Code] may be cited as the 'Comprehensive Forfeiture Act of 1984'."

Short Title

Section 1 of Pub. L. 91-452 provided in part: "That this Act [enacting this section, sections 841 to 848, 1511, 1623, 1955, 1962 to 1968, 3331 to 3334, 3503, 3504, 3575 to 3578, and 6001 to 6005 of this title, and section 1826 of Title 28, Judiciary and Judicial Procedure, amending sections 835, 1073, 1505, 1954, 2424, 2516, 2517, 3148, 3486, and 3500 of this title, sections 15, 87f, 135c, 499m, and 2115 of Title 7, Agriculture, section 25 of Title 11, Bankruptcy, section 1820 of Title 12, Banks and Banking, sections 49, 77v, 78u, 79r, 80a-41, 80b-9, 155, 717m, 1271, and 1714 of Title 15, Commerce and Trade, section 825f of Title 16, Conservation, section 1333 of Title 19, Customs Duties, section 373 of Title 21, Food and Drugs, section 161 of Title 29, Labor, section 506 of Title 33, Navigation and Navigable Waters, sections 405 and 2201 of Title 42, The Public Health and Welfare, sections 157 and 362 of Title 45, Railroads, section 1124 of former Title 46, Shipping, section 409 of Title 47, Telegraphs, Telephones, and Radio telegraphs, sections 9, 43, 46, 916, 1017, and 1484 of former Title 49, Transportation, section 792 of Title 50, War and National Defense, and sections 643a, 1152,

2026, and former section 2155 of Title 50, Appendix, repealing sections 837, 895, 1406, and 2514 of this title, sections 32 and 33 of Title 15; sections 4874 and 7493 of Title 26, Internal Revenue Code, section 827 of former Title 46, sections 47 and 48 of former Title 49, and sections 121 to 144 of Title 50, enacting provisions set out as notes under this section and sections 841, 1511, 1955, preceding 3331, preceding 3481, 3504, and 6001 of this title, and repealing provisions set out as a note under section 2510 of this title] may be cited as the 'Organized Crime Control Act of 1970'."

Savings Provision

Amendment by section 314 of Pub. L. 95-598 not to affect the application of chapter 9 (Sec. 151 et seq.), chapter 96 (Sec. 1961 et seq.), or section 2516, 3057, or 3284 of this title to any act of any person (1) committed before Oct. 1, 1979, or (2) committed after Oct. 1, 1979, in connection with a case commenced before such date, see section 403(d) of Pub. L. 95-598, set out as a note preceding section 101 of Title 11, Bankruptcy.

Separability

Section 1301 of Pub. L. 91-452 provided that: "If the provisions of any part of this Act [see Short Title note set out above] or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby."

Congressional Statement of Findings and Purpose

Section 1 of Pub. L. 91-452 provided in part that:

"The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

"It is the purpose of this Act [see Short Title note above] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

Liberal Construction of Provisions; Supersedure of Federal or State Laws; Authority of Attorneys Representing United States

Section 904 of title IX of Pub. L. 91-452 provided that:

"(a) The provisions of this title [enacting this chapter and amending sections 1505, 2516, and 2517 of this title] shall be liberally construed to effectuate its remedial purposes.

"(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

"(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to—

"(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketeering violation of law;

"(2) invoke the power of any such court to compel the

production of any evidence before any such grand jury; or

"(3) institute any proceeding to enforce any order or process issued in execution of such power or to punish disobedience of any such order or process by any person."

President's Commission on Organized Crime; Taking of Testimony and Receipt of Evidence

Pub. L. 98-368, July 17, 1984, 98 Stat. 490, provided for the Commission established by Ex. Ord. No. 12435, formerly set out below, authority relating to taking of testimony, receipt of evidence, subpoena power, testimony of persons in custody, immunity, service of process, witness fees, access to other records and information, Federal protection for members and staff, closure of meetings, rules, and procedures, for the period of July 17, 1984, until the earlier of 2 years or the expiration of the Commission.

Executive Order No. 12435

Ex. Ord. No. 12435, July 28, 1983, 48 F.R. 34723, as amended Ex. Ord. No. 12507, Mar. 22, 1985, 50 F.R. 11835, which established and provided for the administration of the President's Commission on Organized Crime, was revoked by Ex. Ord. No. 12610, Sept. 30, 1987, 52 F.R. 36901, formerly set out as a note under section 14 of the Federal Advisory Committee Act in the Appendix to Title 5, Government Organization and Employees.

Section Referred to in Other Sections

This section is referred to in sections 924, 1956, 1959 of this title; title 7 section 12a.

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TITLE 18—
ALIENS AND NATIONALITY

CHAPTER 12—
IMMIGRATION AND NATIONALITY

SUBCHAPTER II—IMMIGRATION

Part VIII—General Penalty Provisions

Sec. 1324. Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who—

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined

under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs—

(A) be fined in accordance with title 18 or imprisoned not more than one year, or both; or

(B) in the case of—

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit

an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for ny other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires or employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who—

(i) is an unauthorized alien (as defined in section 1324a(h)(3) f this title), and

(ii) has been brought into the United States in violation of his subsection.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a) of this section, the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) of this section has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an

issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the Unit-

ed States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(June 27, 1952, ch. 477, title II, ch. 8, Sec. 274, 66 Stat. 228; Pub. L. 95-582, Sec. 2, Nov. 2, 1978, 92 Stat. 2479; Pub. L. 97-116, Sec. 12, Dec. 29, 1981, 95 Stat. 1617; Pub. L. 99-603, title I, Sec. 112, Nov. 6, 1986, 100 Stat. 3381; Pub. L. 100-525, Sec. 2(d), Oct. 24, 1988, 102 Stat. 2610; Pub. L. 103-322, title VI, Sec. 60024, Sept. 13, 1994, 108 Stat. 1981; Pub. L. 104-208, div. C, title II, Secs. 203(a)-(d), 219, title VI, Sec. 671(a)(1), Sept. 30, 1996, 110 Stat. 3009-565, 3009-566, 3009-574, 3009-720; Pub. L. 106-185, Sec. 18(a), Apr. 25, 2000, 114 Stat. 222.)

References in Text

The Federal Rules of Evidence, referred to in subsec. (d), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Amendments

2000—Subsec. (b). Pub. L. 106-185 inserted heading and amended text of subsec. (b) generally, substituting present provisions for provisions relating to conveyances subject to seizure and forfeiture, exceptions, officers and authorized persons, disposition of forfeited conveyances, and suits and actions.

1996—Subsec. (a)(1). Pub. L. 104-208, Sec. 671-(a)(1), made technical amendment to directory language of Pub. L. 103-322, Sec. 60024(1)(F). See 1994 Amendment note below.

Subsec. (a)(1)(A)(v). Pub. L. 104-208, Sec. 203(b)-(1), which directed the amendment of subsec. (a)-(1)(A) by adding cl. (v) at end, was executed by adding cl. (v) after cl. (iv), to reflect the probable intent of Congress.

Subsec. (a)(1)(B)(i). Pub. L. 104-208, Sec. 203(a), (b)(2)(A), inserted "or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain" after "subparagraph (A)(i)".

Subsec. (a)(1)(B)(ii). Pub. L. 104-208, Sec. 203(b)(2)(B), substituted "(iv), or (v)(II)" for "or (iv)".

Subsec. (a)(1)(B)(iii), (iv). Pub. L. 104-208, Sec. 203(b)(2)(C), (D), substituted "(iv), or (v)" for "or (iv)".

Subsec. (a)(2). Pub. L. 104-208, Sec. 203(d), substituted "for each alien in respect to whom a violation of this paragraph occurs" for "for each transaction constituting a violation of this paragraph, regardless of the number of aliens involved" in introductory provisions.

Subsec. (a)(2)(B). Pub. L. 104-208, Sec. 203(b)(3), in concluding provisions, substituted "be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or

(B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years." for "be fined in accordance with title 18 or in the case of a violation of subparagraph (B)(ii), imprisoned not more than 10 years, or both; or in the case of a violation of subparagraph (B)(i) or (B)(iii), imprisoned not more than 5 years, or both."

Subsec. (a)(2)(B)(i). Pub. L. 104-208, Sec. 203(c), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: "a second or subsequent offense,".

Subsec. (a)(3). Pub. L. 104-208, Sec. 203(b)(4), added par. (3).

Subsec. (d). Pub. L. 104-208, Sec. 219, added subsec. (d).

1994—Subsec. (a)(1). Pub. L. 103-322, Sec. 60024(1)(F), as amended by Pub. L. 104-208, Sec. 671(a)(1), substituted "shall be punished as provided in subparagraph (B)" for "shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both, for each alien in respect to whom any violation of this paragraph occurs" in concluding provisions.

Pub. L. 103-322, Sec. 60024(1)(A)-(E), (G), designated existing provisions of par. (1) as subpar. (A) of par. (1), redesignated subpars. (A) to (D) of former par. (1) as cls. (i) to (iv), respectively, of subpar. (A), and added subpar. (B).

Subsec. (a)(2)(B). Pub. L. 103-322, Sec. 60024(2), in concluding provisions, substituted "or in the case of a violation of subparagraph (B)(ii), imprisoned not more than 10 years, or both; or in the case of a

violation of subparagraph (B)(i) or (B)(iii), imprisoned not more than 5 years, or both." for "or imprisoned not more than five years, or both".

1988—Subsec. (a)(1). Pub. L. 100-525, Sec. 2(d)(1), in closing provisions substituted "or imprisoned" for "imprisoned" and "this paragraph" for "this subsection".

Subsec. (b)(4)(C), (5). Pub. L. 100-525, Sec. 2(d)(2), amended Pub. L. 99-603, Sec. 112(b)(5), (8). See 1986 Amendment note below.

1986—Subsec. (a). Pub. L. 99-603, Sec. 112(a), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: "Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

"(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

"(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place,

including any building or any means of transportation;

or

"(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

Subsec. (b)(1). Pub. L. 99-603, Sec. 112(b)(1), (2), substituted "has been or is being used" for "is used" and "seized and subject to" for "subject to seizure and" in provisions preceding subpar. (A).

Subsec. (b)(2). Pub. L. 99-603, Sec. 112(b)(3), inserted "or is being" after "has been".

Subsec. (b)(3). Pub. L. 99-603, Sec. 112(b)(4), substituted "property" for "conveyances".

Subsec. (b)(4)(C). Pub. L. 99-603, Sec. 112(b)(5), as amended by Pub. L. 100-525, Sec. 2(d)(2)(A), inserted ", or the Maritime Administration if appropriate under section 484(i) of title 40,".

Subsec. (b)(4)(D). Pub. L. 99-603, Sec. 112(b)(6), added subpar. (D).

Subsec. (b)(5). Pub. L. 99-603, Sec. 112(b)(7)-(9), as amended by Pub. L. 100-525, Sec. 2(d)(2)(B), substituted ", except that" for ": Provided, That" in provisions preceding subpar. (A), substituted "had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law" for "was not lawfully entitled to enter, or reside within, the United States" wherever appearing, inserted "or of the Department of State" in subpar. (B), and substituted "had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law" for "was not entitled to enter, or reside within, the United States" in subpar. (C).

1981—Subsec. (b). Pub. L. 97-116 strengthened the seizure and forfeiture authority by striking out the "innocent owner" exemption and merely requiring the Government to show probable cause that the conveyance seized has been used to illegally transport aliens, which when demonstrated, shifts the burden of proof to the owner or claimant to show by a preponderance of the evidence that the conveyance was not illegally used, by relieving the Government of the obligation to pay any administrative and incidental costs incurred by a successful claimant provided probable cause for the original seizure was demonstrated, and by striking out the requirement that the Government satisfy

any valid lien or third party interest in the conveyance without expense to the interest holder by providing the lienholders interest be satisfied only after costs associated with the seizure have been deducted.

1978—Subsecs. (b), (c). Pub. L. 95-582 added subsec. (b) and redesignated former subsec. (b) as (c).

Effective Date of 2000 Amendment

Pub. L. 106-185, Sec. 21, Apr. 25, 2000, 114 Stat. 225, provided that: "Except as provided in section 14(c) [set out as an Effective Date note under section 2466 of title 28, Judiciary and Judicial Procedure], this Act [see Short Title of 2000 Amendment note set out under section 981 of Title 18, Crimes and Criminal Procedure] and the amendments made by this Act shall apply to any forfeiture proceeding commenced on or after the date that is 120 days after the date of the enactment of this Act [Apr. 25, 2000]."

Effective Date of 1996 Amendment

Section 203(f) of div. C of Pub. L. 104-208 provided that: "This section [amending this section and enacting provisions set out as a note under section 994 of Title 28, Judiciary and Judicial Procedure] and the amendments made by this section shall apply with respect to offenses occurring on or after the date of the enactment of this Act [Sept. 30, 1996]."

Amendment by section 671(a)(1) of Pub. L. 104-208 effective as if included in the enactment of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, see section 671(a)(7) of Pub. L. 104-208, set out as a note under section 1101 of this title.

Effective Date of 1988 Amendment

Amendment by Pub. L. 100-525 effective as if included in enactment of Immigration Reform and Control Act of 1986, Pub. L. 99-603, see section 2(s) of Pub. L. 100-525, set out as a note under section 1101 Of this title.

Effective Date of 1981 Amendment

Amendment by Pub. L. 97-116 effective Dec. 29, 1981, see section 21(a) of Pub. L. 97-116, set out as a note under section 1101 of this title.

Abolition of Immigration and Naturalization Service and Transfer of Functions

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of this title.

Section Referred to in Other Sections

This section is referred to in section 1101 of this title; title 10 section 374; title 18 sections 982, 1961, 2516.

No. 07-1453

In the Supreme Court of the United States

CHENG CHUI PING, AKA SISTER PING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's forfeited claim that the district court erred in instructing the jury on the "specified unlawful activity" element of the international promotional money laundering statute, 18 U.S.C. 1956(a)(2)(A), was not reversible plain error.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The summary order of the court of appeals (Pet. App. 1a-7a) is unreported but is available at 2007 WL 4102736.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2007. A petition for rehearing was denied on February 11, 2008 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on May 12, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to engage in alien smuggling,

trafficking in ransom proceeds, hostage taking, and money laundering, in violation of 18 U.S.C. 371; money laundering, in violation of 18 U.S.C. 1956(a)(2)(A); and trafficking in ransom proceeds, in violation of 18 U.S.C. 1202. Pet. App. 3a. Petitioner was sentenced to aggregate terms of 420 months of imprisonment, to be followed by a three-year term of supervised release, and was fined $250,000. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner was the leader of a large and profitable alien smuggling operation. Petitioner and her associates would recruit alien "customers" in China, obtain false travel documents for them, transport them to the United States along dangerous routes and in inhumane conditions, and then hold them hostage in the United States until their smuggling fees were paid. Gov't C.A. Br. 3-4.

The operation began in the early 1980s, when petitioner would smuggle villagers from China's Fujian Province into the United States in exchange for thousands of dollars. By the early 1990s, petitioner was smuggling thousands of illegal aliens into the United States, often hundreds at a time on cargo ships. Petitioner operated her business out of a small storefront in Chinatown in New York City. From there, petitioner also operated a money-transmitting business through which she laundered smuggling proceeds for herself and other alien smugglers and trafficked in ransom money. Petitioner had "employees" in China, Thailand, Hong Kong, Guatemala, Mexico, and Kenya, among other countries. Petitioner also enlisted the help of the Fuk Ching Gang, a violent criminal enterprise responsible for murders, robberies, and other crimes. Gang members offloaded aliens from arriving cargo ships. On one occasion in 1993, the gang members failed to meet a cargo ship (the *Gol-*

den Venture) on which petitioner and other alien smugglers had transported a group of aliens to New York. At the smugglers' instruction, the captain ran the ship aground and instructed the passengers to wade or swim to shore. Dozens of aliens did so, and ten of them drowned. On another occasion in approximately 1998, 14 aliens being smuggled by petitioner drowned off the coast of Guatemala. Gov't C.A. Br. 4-12.

2. On June 6, 2000, a federal grand jury in the Southern District of New York filed a seven-count superseding indictment charging petitioner with conspiracy to engage in alien smuggling, trafficking in ransom proceeds, hostage taking, and money laundering, in violation of 18 U.S.C. 371; two counts of hostage taking, in violation of 18 U.S.C. 1203(a); two counts of money laundering, in violation of 18 U.S.C. 1956(a)(2)(A); operating an illegal money transmitting business, in violation of 18 U.S.C. 1960(a); and trafficking in ransom proceeds, in violation of 18 U.S.C. 1202. Petitioner was extradited from Hong Kong on five of those counts (excluding one count of hostage taking and the single count of operating an illegal money transmitting business, which were not submitted to the Hong Kong magistrate for consideration). Gov't C.A. Br. 1-2.

a. Count 3 of the indictment charged petitioner with money laundering in connection with petitioner's transmittal of $30,000 from the United States to Thailand in March 1991 on behalf of Weng Yu Hui (Weng). Gov't C.A. Br. 17.[1] The indictment alleged that petitioner transmitted the funds "with the intent to promote the carrying on of specified unlawful activity, to wit, the

[1] The 1991 money laundering count was originally Count 4 in the superseding indictment. It was subsequently renumbered as Count 3. Gov't C.A. Br. 2.

smuggling by airplane of four aliens from the PRC to New York where they would be held hostage until money was paid." Gov't C.A. App. A37-A38.

b. The evidence at trial in support of Count 3 established that in 1984, Weng had hired petitioner to smuggle him to the United States from China for an $18,000 fee. Petitioner held Weng hostage, first in Guatemala and then in New York, until Weng's and his brother-in-law's smuggling fees were paid or guaranteed. Weng and petitioner then became friends. Gov't C.A. Br. 5-6.

In 1991, Weng decided to enter the alien smuggling business. His first operation involved smuggling four individuals from Thailand into the United States. To finance the operation, Weng's associates in Thailand needed $30,000. Weng brought $30,000 in cash to petitioner's store. Weng gave the cash, passport numbers, and a cell phone contact number to petitioner and told petitioner that the money was needed in Thailand in a few days. After Weng handed petitioner the cash, petitioner remarked, "[N]ow you're my competitor." Weng successfully smuggled the four individuals into the United States. Weng brought them to petitioner's restaurant, pointed them out to petitioner, and remarked that his operation had been successful. Petitioner had no comment. Gov't C.A. Br. 5-7, 34 (quoting 5/16/05 Tr. 121-122).

c. In instructing the jury on Count 3, the district court read the narrative description of the specified unlawful activity that was contained in the indictment. The court then instructed the jury that, in order to convict petitioner of the charge, it was required to find, among other things, that "the defendant acted with the intent to promote the carrying on of specified unlawful activity,

namely the acts of alien smuggling or hostage taking *specified in [Count 3]*." Gov't C.A. Br. 19-20. The court also instructed the jury that it was required to be unanimous as to which specified unlawful activity (*i.e.*, alien smuggling or hostage taking) it found. *Id.* at 20. The district court did not further define "alien smuggling" in that instruction. In connection with the conspiracy charge, however, the court informed the jury that alien smuggling has three elements: (1) the defendant "brought an alien to the United States, in any manner whatsoever, and did so at a place that was not a designated port of entry;" (2) "the defendant knew that the person brought to the United States was an alien;" and (3) "the defendant acted wil[l]fully." *Ibid.*

3. On appeal, petitioner contended, *inter alia*, that the district court constructively amended the indictment by failing to instruct the jury that, in order to constitute a "specified unlawful activity" for purposes of the money laundering statute, alien smuggling must be "committed for the purpose of financial gain." Pet. C.A. Br. 27 (quoting 18 U.S.C. 1961(1) (Supp. V 2005)). The court of appeals affirmed. Pet. App. 1a-7a.

a. The international money laundering statute, 18 U.S.C. 1956(a)(2)(A), makes it a crime to "transport[], transmit[], or transfer[] * * * a monetary instrument or funds from a place in the United States to or through a place outside the United States * * * with the intent to promote the carrying on of specified unlawful activity." Section 1956(c)(7)(A) defines the term "specified unlawful activity" to include, *inter alia*, "any act or activity constituting an offense listed in" 18 U.S.C. 1961(1) (Supp. V 2005), which is the definition of "racketeering activity" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961

et seq. RICO defines "racketeering activity" to include any act indictable under certain provisions of the Immigration and Nationality Act (including alien smuggling) if the act "was committed for the purpose of financial gain." 18 U.S.C. 1961(1)(F) (Supp. V 2005).

b. The court of appeals observed that petitioner had failed to object at trial to the district court's omission of the "financial gain" component of alien smuggling as a specified unlawful activity. Pet. App. 3a-4a. The court first rejected petitioner's claim that the omission from the jury charge resulted in a constructive amendment of the indictment. *Id.* at 4a. The court noted that the district court had instructed the jury that in order to convict petitioner of money laundering, it was required to find that the evidence proved the particular specified unlawful activity that was charged in the text of the money laundering count. *Ibid.* The court held that, although the indictment did not allege the "purpose of financial gain" requirement "in so many words," that requirement "was consistent with, and implied by" the allegation in the indictment that the four aliens being smuggled would be held hostage until money was paid. 2007 WL 4102736, at *1.[2] The court then rejected petitioner's constructive amendment claim because the court "discern[ed] no risk that [petitioner] was either convicted of an offense that was not charged in the indictment or that she lacked sufficient notice to prepare for trial." Pet. App. 4a.

In the alternative, the court construed petitioner's claim of error as a challenge to the jury instruction. Pet. App. 5a. Because petitioner failed to object to the

[2] The reproduction of the court of appeals' opinion in petitioner's appendix (at 4a) omits some of the text. We therefore cite to this portion of the opinion as it appears in Westlaw.

money laundering instruction on the ground that she asserted on appeal, the court concluded that the plain-error standard of review applied. *Ibid.* The court observed that "overwhelming evidence" established that petitioner knew that the alien smuggling activities at issue "were engaged in for purposes of profit" and held that "any error in the charge was not only not plain, it was harmless." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 16-23) that the court of appeals erred in its application of the plain-error standard to petitioner's forfeited claim of instructional error. Petitioner asserts (Pet. 18) that the instructional error in this case "create[d] an alternative, unconstitutional theory" of conviction on the money laundering count that requires reversal. Petitioner also contends (Pet. 18) that there is a conflict among the courts of appeals on "the standard of review to be used where an omission or misdescription of an element of the offense permits a conviction on an alternative invalid theory." Further review is unwarranted. The court of appeals did not err, and the arguments for further review that petitioner raises in this Court were neither raised in nor addressed by the court below. It is therefore not necessary to hold this case for *Hedgpeth* v. *Pulido*, cert. granted, No. 07-544 (oral argument scheduled for Oct. 15, 2008).

1. Petitioner concedes (Pet. 13, 19-23) that she did not object at trial to the omission of the "financial gain" requirement from the jury instruction on money laundering premised on the specified unlawful activity of alien smuggling and that the plain-error standard applies. In *Johnson* v. *United States*, 520 U.S. 461, 466-470 (1997), this Court applied the plain-error analysis of

United States v. *Olano*, 507 U.S. 725 (1993), to a forfeited claim that the district court erroneously failed to submit the materiality element of perjury to the jury. The Court upheld the perjury conviction, finding that the evidence of materiality was "overwhelming" and the error therefore did "not meet the final requirement of *Olano*," *i.e.*, that the forfeited error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." 520 U.S. at 469-470 (citation omitted). The Court did not decide whether the failure to submit an offense element to the jury is "structural" error in the sense that it necessarily affects substantial rights and, if the claim is preserved, requires automatic reversal. *Id.* at 468-469. In *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999), the Court decided the issue left open in *Johnson* and held that the omission of an offense element from a jury instruction is subject to harmless-error review. The Court held that the error at issue in *Neder*—the omission of the materiality element from the jury instruction on the offense of tax fraud—was harmless beyond a reasonable doubt because the evidence of materiality was "uncontested and supported by overwhelming evidence." *Id.* at 17.

The court of appeals correctly applied the plain-error standard of *Olano* to petitioner's forfeited claim and did not err by upholding petitioner's money laundering conviction under that standard. Although it was error to exclude the "for financial gain" requirement from the jury instruction, it is not clear or obvious that the district court's instructions failed to apprise the jury of that requirement nonetheless. Count 3 charged petitioner with transferring money to Thailand with the intent to promote the smuggling of aliens from China to New York "where [the aliens] would be held hostage

until money was paid." Gov't C.A. App. A37-A38. The district court read this description of the charged specified unlawful activity to the jury. *Id.* at A718. And the court instructed the jury that, in order to convict petitioner, it was required to find "the acts of alien smuggling or hostage taking specified in" the indictment. *Id.* at A719. As the court of appeals observed in rejecting petitioner's constructive amendment claim, the jury instructions, viewed as a whole, required the jury to find that Weng's alien smuggling venture involved the payment of money and thus was "for financial gain."

Moreover, as the court of appeals held, petitioner cannot carry her burden under the plain-error standard of demonstrating that the instructional omission affected her substantial rights or "seriously affect[ed] the fairness, integrity or public reputation" of her trial. *Johnson*, 520 U.S. at 469-470 (citation omitted). The court correctly found (Pet. App. 5a), in a fact-bound ruling that does not warrant this Court's review, that the evidence that petitioner "knew [Weng's] smuggling activities were engaged in for purposes of profit" was "overwhelming."

While petitioner's current theory (Pet. 22) is that the jury might have concluded that petitioner believed Weng was smuggling his own relatives, the evidence showed that the smuggling mission involving the four aliens was the beginning of Weng's ongoing business enterprise with petitioner, which later resulted in both of their "customers" being stranded off the coast of New York on the *Golden Venture*. Gov't C.A. Br. 8-11. Petitioner's knowledge of the "financial gain" motive of Weng's smuggling activities is best demonstrated by her response to receiving Weng's $30,000 for transmittal to Thailand: she stated that Weng was "now [her] competi-

tor." *Id.* at 6 (quoting 5/16/05 Tr. 121-122). As the court of appeals observed, the trial record is "replete with evidence that these smuggling rings were operated as commercial enterprises" and that petitioner knew of that fact. Pet. App. 6a. Indeed, petitioner's defense to the money laundering charge at trial was not that Weng's alien smuggling venture was not for financial gain, but that she lacked knowledge that Weng was smuggling aliens at all. Gov't C.A. Br. 33. The court of appeals did not err in finding that the evidence of petitioner's knowledge of Weng's profit motive was uncontested and overwhelming and that the district court's omission of the "for financial gain" requirement from the jury instruction was therefore not reversible plain error.

2. Relying on this Court's decision in *Stromberg* v. *California*, 283 U.S. 359 (1931), petitioner contends (Pet. 18-21) that the district court's jury instruction "created an alternative improper theory of conviction" that requires reversal because it is "impossible to ascertain whether [petitioner] has been punished for non-criminal conduct." Petitioner further contends (Pet. 18-19) that there is a conflict among the courts of appeals concerning the standard of review that applies "where an omission or misdescription of an element of the offense permits a conviction on an alternative invalid theory."

In *Hedgpeth* v. *Pulido*, cert. granted, No. 07-544 (oral argument scheduled for Oct. 15, 2008), the question presented is whether the Ninth Circuit erred in granting habeas relief on the ground that the submission of two alternative theories of guilt to the jury, one of which was legally erroneous, constituted structural error. Although petitioner's arguments for further review impli-

cate the underlying legal issue presented in *Hedgpeth*, this case need not be held pending the outcome of that case. First, this case arises in the federal plain-error context because petitioner did not raise her current claim in the district court. *Hedgpeth* arises in federal habeas review under 28 U.S.C. 2254(d), and the resolution of that issue raises distinct questions from application of federal plain-error standards. For example, as *Johnson* establishes, when the plain-error standard applies, the characterization of an error as "structural" does not warrant relief unless the final requirement of *Olano* also is satisfied. *Johnson*, 520 U.S. at 468-470. Second, petitioner did not cite *Stromberg* in the court of appeals, nor did she argue (Pet. 18) that the district court's jury instruction created "an alternative, unconstitutional theory," which therefore was "qualitatively different from erroneous instructions which merely omit or misdescribe an element." Because the question on which petitioner seeks the Court's review was not presented to or decided by the court of appeals, it is not properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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